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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, Attorney General of the United States, et al., Petitioners,

v.

JENNY LISETTE FLORES, et al.,

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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A

The issue here is narrow. Involved is the Immigration and Naturalization Service's (INS) practice on the detention and release of children, a practice the agency has significantly modified since filing its petition for a writ of certiorari. Respondent children do not challenge the Immigration and Nationality Act, INS regulations as written, or any other exercise of plenary power over immigration. Neither the holding nor the rationale of the court below will allow a greater number persons into this country or otherwise affect the INS's authority to determine the circumstances under which persons are admitted, excluded, or deported.

At issue here is an INS practice that imposes automatic, non-individualized, and indefinite detention upon children when reasonable alternatives for release to responsible adult or licensed child welfare programs are available. This challenge is based squarely on an uncontroverted record showing INS practices to be unconscionable *as they have been applied* toward children. The INS's petition ignores the record showing that the agency's routine detention of children *in fact* does nothing to protect them or further any other legitimate governmental purpose.

The INS sharply departs from accepted child welfare standards in seeking to "protect" children by jailing them. The agency's blanket approach to juvenile detention prompted the Child Welfare League of America, Defense for Children International, U.S. Catholic Conference, Lutheran Immigration and Refugee Services, and Global Ministries of the United Methodist Church, among many others, to file briefs

amici curiae decrying the agency's wholesale incarceration of children.

As these amici point out, sound child welfare practices emphasize that routinely incarcerating children, even under ideal conditions, is inimical to their welfare— and conditions in INS jails are anything but ideal.

Again the petition misstates and goes outside the record in trying to portray INS detention camps as good places for children. The evidence establishes that the INS houses children for prolonged periods in facilities failing to meet minimal standards for decency and humanitarian care. Conditions in INS detention facilities are particularly harmful to children's physical and emotional well-being.

B

The holding and rationale of the lower court are unarguably narrow. The en banc court of appeals reasonably applied settled principles of due process to an unusual and extraordinarily compelling set of facts. Not surprisingly, the INS points to *no* conflict between the court of appeals' opinion and the opinion of any other court of appeals.

The practical effect of the decision below is similarly circumscribed. This is the *first and only* case in which the INS has sought to detain anyone on grounds having nothing to do with the goal of the Immigration and Nationality Act: regulating the admission, exclusion and deportation of aliens. The INS's *sole* justification for automatic detention here -- protecting children — is unprecedented both from the standpoint of immigration law and from the standpoint of modern child welfare practices. The court of appeal's decision, being limited to this peculiar justification for detention, in no way impairs the agency's ability to carry out its statutory mission.

C

Even were the analysis of the court of appeals somehow in error, its *result* is certainly in accord with the decisions of this Court. Respondent children have consistently urged that the detention practice at issue here exceeds the INS's authority under the Immigration and Nationality Act ("INA") because it imposes *automatic* detention, not detention pursuant to any actual exercise of discretion. This Court recently held that the INS must *exercise* discretion to detain in an individual case, *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991), yet the INS here argues it is entitled to pursue a policy of blanket detention for minors. The Court need not and should not review yet another case involving INS detention authority when the agency expressly seeks to exercise that authority inconsistently with *National Center*.

D

On December 13, 1991, after filing its petition in this case, the INS unilaterally altered its policy on releasing detained minors. *For the first time* the INS now appears willing to release minors to "a responsible adult designated by the parent or legal guardian in a sworn affidavit," or to "a licensed child-care facility including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children." Respondents' Appendix.

The courts below, of course, have never had a chance to consider INS policy as it is now being applied, and granting certiorari on the issues the INS raises would, on the one hand, be unfair to the judges of the courts below On the other, because the lower

courts have yet to take evidence on how the INS's current policy is being applied, any decision of this Court would amount to no more than an advisory opinion on a practice the INS purports to have abandoned.

STATEMENT OF THE CASE

I Factual and procedural background

Pursuant to 8 U.S.C. § 1252(a), INS agents arrest minors whom they suspect may be deportable aliens.[1] Such children are arrested pursuant to civil deportation statutes and are rarely accused of any crime.

Generally, the INS releases persons on bond pending the outcome of deportation proceedings. If an individual is not so released, he or she remains incarcerated until proceedings to determine deportability are completed, a process that may take years. 2 Clerk's Record 10 ("CR").

INS practice until September of 1984 was to release children to parents or other responsible adults who could care for the children and give reasonable assurances that the children would appear for deportation proceedings. 88 CR 72; 163 CR 1191; 162 CR 915; 163 CR 1201, 1207, 1213.

[1] Persons are taken into custody upon probable cause they are (1) aliens and (2) deportable from the United States. This preliminary determination, often made by INS officers in an atmosphere of "confusion and pandemonium," United States Commission of Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* 90-91 (1980), provides at most preliminary assurance that a person is either an alien or deportable. Correctly, a person is deportable only if determined to be so in a due process hearing at which the INS bears the burden of proving both alienage and deportability by "clear, unequivocal and convincing" evidence. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966).

While in other parts of the country the INS continued to release children to responsible custodians regardless of blood relationship, in September 1984 INS Regional Commissioner Harold Ezell prescribed a different policy for minors arrested in the INS's Western Region:

> No minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.
>
> District Directors and Chief Patrol Agents are authorized, in unusual and extraordinary cases, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child. Release shall not be permitted if any doubt exists that the child will be properly protected.

3 CR 41.

The result Ezell's directive could not have been more dramatic: children who normally would have been restored to freedom within a day or two were *automatically committed for up to a year in INS detention camps*. 160 CR 400.

On July 11, 1985, 15-year-old Jenny Flores, 16-year-old Dominga Hernandez, 13-year-old Alma Cruz, and 16-year-old Ana Martinez, filed this suit. 1 CR 4-5.[2] On May 16, 1988, the children moved for summary judgment requiring the INS to release them unless

[2] On July 19, 1985, Jenny and Dominga, still in jail under the new regional policy, asked Senior District Judge Robert J. Kelleher to order their release. 5 CR. Judge Kelleher ordered the INS to free them to responsible custodians the INS had rejected. 10 CR.

there was some reason to believe that release to an available custodian would be contrary to a particular child's best interests. The INS urged the court to defer ruling until it published new regulations covering the release of minors, and Judge Kelleher agreed. CR 252.

The new regulations, however, retained the INS's wholesale approach to jailing children. The regulations did not so much as permit minors' release to licensed juvenile shelters or long-time family friends. Indeed, the only apparent change the new regulations made was to add grandparents to the list of close relatives to whom minors were already being released.[3] There remained no alternative to indefinite confinement for orphans, children whose relatives are in foreign countries, or children whose relatives refused to appear for them.[4]

Some three years after the case had first come before it, the district court issued a simple order in the children's favor. 256 CR. The facts compelling the district court's action remain uncontroverted.

II Scores of children denied any chance to regain freedom.

The INS represents that its regulation imbues local officials with discretion to release minors to custodi-

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[3] Because INS regulations had for years required that children held for *exclusion* hearings be released to certain adult relatives in addition to parents and guardians, Judge Kelleher had earlier ordered the agency to release children held for *deportation* hearings to those same relatives. 188 CR. The new INS regulation applied to children held for either deportation or exclusion proceedings.

[4] Two of the four class representatives, including one girl freed by Judge Kelleher, would still have remained jailed under the "new" regulations.

ans not appearing on the agency's short list. In practice, however, INS field officers testified that they *never* released children to anyone except close adult relatives. *E.g.*, 161 CR 870-71. The "unusual and compelling" exception in fact provided children no meaningful chance to regain their freedom.

For boys and girls without an immediate relative to come for them, the INS's regulation meant jail unless and until a guardian could be appointed, a process of many weeks.[5] In reality, few children in INS detention ever had any real chance of obtaining a guardian: apart from being physically confined, such children are typically unfamiliar with legal procedures and unable to afford a lawyer. Obtaining a guardian proved a false hope for ending indefinite detention.

III The dearth of due process following administrative arrest.

The INS readily confesses to *automatically* jailing children until and unless an immediate relative comes for them. The agency argues that its scheme is saved by the availability of a bond "redetermination" hearing before an immigration judge, but this is a hearing it will provide *only "upon*

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[5] Although California law provides for expedited appointment of "temporary" guardians, the Los Angeles Superior Court declared children in INS detention ineligible for temporary guardians. 163 CR 1138-39. Denied temporary guardians, children were obliged to remain in INS jails until a permanent guardian could be appointed— a minimum of four to six weeks. *Id.* at 1163.

application" of the child. 8 C.F.R. § 242(b) (emphasis added).[6]

Though the INS thinks a child is "adequately protected by his right to seek a hearing before an immigration judge," Petition at 23, Judge Rymer points out that in reality

> there is no process there. While procedures provided by the executive in immigration matters are rarely held inadequate, *some* process is due. Nothing in this regulation triggers any determination at any particular time of whether an alien juvenile who is presumptively eligible for release, but has no family, may be released to the custody of an unrelated adult who will agree to her care and appearance. Nor is there any light at the end of the tunnel; there is no time limit on continued detention, despite the child's eligibility for release. For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part) (emphasis in original; citations omitted).

Detention, it seems, is the beginning and the end of the INS's purported interest in acting *parens patriae*. In all other matters, the INS is content to leave a child on his or her own to invoke and proceed through its complex administrative procedures.

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[6] Nothing in the INS's regulations requires an immigration judge to decide youngsters' custody motions within any specific time.

IV The uncontroverted proof that INS detention of children furthers no legitimate governmental purpose.

To read the petition, the INS houses minors in "special child-care facilities," Petition at 2, that are particularly salutary for children suffering post-traumatic stress disorder. *Id.* at 7 n.9.[7] Juvenile justice expert Paul Demuro, who visited several of the INS's facilities, describes things differently:

> The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire ... At [the San Diego] facility each barracks is secured through the use of fences,

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[7] The INS supports this portrayal not by reference to any record evidence, but by citing a partial settlement agreement in which the agency pledged to improve conditions in western jails in which it holds minors. There is no evidence that conditions have actually improved. To the contrary, nine non-profit organizations that work with immigrant and refugee children presented voluminous evidence of public record to the court of appeals showing that conditions in INS camps are harmful to children. Brief *Amicus Curiae* of Immigrant, Refugee and Civil Rights Groups, March 1, 1991. These amici cite, *inter alia*, a recent state report on conditions affecting juveniles in INS detention:

> A recent case of a twelve year old undocumented youth taken into immigration court in handcuffs and shackles reignited public interest in INS treatment of youth.... INS has no standards for children in detention and according to the children's own testimony, use of handcuffs is not uncommon in addition to arbitrary punishment, inadequate food, lack of access to counsel or phones. One youth who was subsequently sent to Juvenile Hall described the vast improvement over INS detention conditions.

California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990).

> barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16-18'), barbed wire, and supervised by uniformed guards ....
>
> No facility had recreational or educational areas, equipment or materials meeting accepted standards for juvenile detention. In all four facilities, young children ate their meals with unrelated adults. The major activity at each facility is TV watching and lining up to make collect telephone calls.

163 CR 1277.

Though the INS admits it detains children for their own "protection" and for no other purpose, 76 CR 45-46, the uncontroverted evidence shows that children are endangered, not protected, by open-ended terms in INS jails.

• *Children in INS detention routinely share sleeping quarters, bathrooms, and other common areas with unrelated adult prisoners of both sexes.*

At the ECI facility at El Centro, California, young unaccompanied boys mixed with adult women. 159 CR 351. Children and adults shared the same unpartitioned showers. Adult women and children shared the same toilets, which also lacked partitions. *Id.* at 353. There were no physical barriers between the male and female sleeping areas at the INS detention facilities at Hollywood, California, 77 CR 686, or Inglewood, California. 160 CR 356-57.[8] Similar practices prevailed at other facilities. 160 CR 271.

[8] On at least one occasion, a boy was sexually abused by a female adult while in an INS contract facility in Laredo, Texas. A top INS official dismissed the incident as perhaps having been "consensual." 159 CR at 145-46.

• *Minors in INS detention have been routinely strip searched without the slightest cause.*

In Laredo, Texas, jailers strip searched children simply because they had visited with their attorneys, 78 CR 1153-54, purportedly to stop the lawyers' soliciting clients. 76 CR 395. Standard search procedures were also typically lacking. At the INS's staging facility near San Diego, California, teenage girls were required to undress completely; teenage boys were permitted to leave their underwear on. 163 CR 1281.[9]

• *Children in INS jails are routinely denied the right to visit with their families and friends.*

Children incarcerated at the Casa San Juan facility in San Diego, California, were barred from ever seeing their family members. 163 CR 1070. At the Staging Area in San Diego, the INS simply never told children that they could receive visitors. 160 CR 311. Not surprisingly, children's visits were "far and few between." *Id.* at 311. Any visits that did occur were abruptly terminated after 15 minutes. *Id.* at 312-13.

• *The INS conceded that incarcerated children receive few or no educational services or reading materials.*

The vast majority of children in INS detention received *no* educational instruction at all because, as a top INS official put it, "*It is not [an INS] function.* It would be costly." 76 CR 403 (emphasis added). The agency admitted that seven of the twelve facilities in which minors were most often held provided youngsters *no* instruction whatsoever. Those facilities ac-

[9] In 1988, the district court enjoined the INS's arbitrary strip search practices. *See Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal. 1988).

counted for over 64 percent of all detained juveniles. 78 CR 1159.

• *Children in INS jails have little or no recreation.* As one INS jailer testified, children in his facility could only "play in the dirt" or go out in the desert summer "and let their tongue[s] hang out in the heat." 159 CR 201. Recreational opportunities were similarly lacking at other facilities throughout the country. *E.g.*, 160 CR 314-15.

The uncontroverted record thus shows the INS is at best marginally qualified to care for children during months of open-ended confinement. Caring for children in an institutional setting is quite clearly "not an INS function." In contrast to its deplorable record as a child-care provider, however, the INS has proved quite competent at releasing children to responsible, if unrelated, adults.

• *For years the INS released minors to non-relatives, yet there has never been* any *case in which a minor released to such a custodian suffered harm or neglect.*

Until now the INS proved willing and able to place children with responsible, if unrelated, custodians. *See, e.g.*, 163 CR 1209 (Baltimore district policy to release juveniles to "parent, family member or a responsible adult"); 162 CR 915 (San Francisco district policy to release minors to "a responsible adult"). In over six years of litigation, the INS produced *no* evidence that this policy resulted in any minor actually being harmed or neglected. Nor has the INS ever

been sued for negligently releasing a minor to an unrelated adult. 76 CR 27; 159 CR 26.[10]

In fine, the INS admitted having *no* evidence that juveniles released to parents or legal guardians are *in fact* less likely to be harmed or neglected than if released to other adults or child welfare organizations. 76 CR 65, 260-91. The agency admitted that it merely "*presume[d]* that harm or neglect will be less likely if a minor is in the custody of a person such as a parent or legal guardian ..." 78 CR 1239 (emphasis supplied).

Ironically, the Assistant Supervising Probate Attorney for the Los Angeles County Superior Court described the court's procedure for screening adults seeking appointment as guardians as involving only a brief personal interview and a sworn petition setting out the proposed guardian's qualifications,[11] 163 CR at 1159-60, a process remarkably similar to that the INS for years had successfully employed.

• *Juvenile justice standards are unanimous that releasing children to available responsible adults, whether relatives or not, is far preferable to jailing them.*

The INS's years of successfully placing children with responsible, if unrelated, custodians, confirms a basic tenet of child welfare: arbitrary restrictions on children's release are contrary to sound child welfare practices.

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[10] If anything, the INS risks greater liability by incarcerating children. Four INS officers are currently being sued for beating and psychologically abusing minors during two separate incidents in 1991. *Garcia v. United States*, No. CV 91-0908-GT (S.D. Cal.).

[11] As discussed, however, the superior court refuses to appoint temporary guardians for minors in INS detention.

All recognized juvenile justice standards declare that releasing children to reputable adults, whether relatives or not, is far preferable to jailing them. 171 CR 553.[12] *Congress, too, joins this consensus*, mandating that federal magistrates release minors to reputable adults regardless of blood relationship:

> If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, *or other responsible party* (including, but not limited to, the director of a shelter-care facility) ... unless the magistrate determines ... that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

18 U.S.C. § 5034 (emphasis supplied).

So wide of the mark is the INS's approach to detaining children that the Child Welfare League of America, Defense for Children International, the U.S. Catholic Conference, Lutheran Immigration and Refugee Services, and Global Ministries of the United Methodist Church, among many others, were compelled to file briefs *amicus curiae* in support the respondent children. As these respected child welfare advocates point out, experience has shown

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[12] *E.g.*, U.S. Department of Health Education and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* (1974); National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* (1982); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973); Institute of Judicial Administration/American Bar Association, *Standards Relating to Noncriminal Misbehavior* (1982), and *Standards Relating to Interim Status* (1982); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* (1968).

> the devastating effect of detention on the psychological and physical health of these children. [C]onfinement in an institutional setting such as an INS detention facility can impair children's physical and emotional development; diminish their sense of self-worth; place them at risk of physical harm by other detainees; and deprive them of contact with family and other sources of psychological and social support. ... *The INS's policy is not only inhumane to these children but also detrimental to society. The psychological damage to these children caused by their detention will bring about long-term detrimental effects to our society, since some of these children, after completing the deportation hearing process, will remain legally in this country.*

Brief of *Amici Curiae* United States Catholic Conference, et al., on Behalf of Plaintiffs-Appellees on Rehearing En Banc, at 10-11 (emphasis supplied).

In sum, the uncontroverted record shows the INS's detention practice to be wholly at odds with the agency's nominal purpose: protecting children. Examined in light of the evidence, the INS's practice simply makes no sense.

V The relief granted.

Upon these facts the district court ordered two things: first, that the INS release minors to reputable adults *unless there is reason not to*;[13] second, in those

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[13] The district court's order requires the INS to release "any minor otherwise eligible for release to his parents, guardian, custodian, conservator, or other *responsible* adult party." 256 CR 2 (emphasis supplied). The agency need not release if it has any actual reason to believe that an available adult is not

instances where the INS denies release, that the agency should have its decision independently reviewed.

As Judge Rymer points out, the district court's order is wholly procedural. App. 44a. *Nothing bars the agency from exercising discretion to deny release to persons deemed unable to care for a child.* The agency must only determine that a given child will benefit from detention if it wishes to jail that child indefinitely. The district court's order thus provides no more than unobtrusive *procedural* protection for children's basic liberty.

REASONS FOR DENYING THE WRIT

I The holding and rationale of the opinion below are sound, narrow, and have no significant impact on the administration of the immigration laws.

The heart of the INS's complaint is that the court of appeals showed too little deference to its detention practices. Petition at 15. The agency argues that it enjoys plenary power to regulate immigration and that this power extends to its detaining children whom it alleges, but has never proved, are deportable aliens. The INS therefore concludes that the courts below erred in requiring that it actually exercise discretion before committing a child to indefinite incarceration. Absent the gloss of "plenary authority," however, the court of appeal's opinion is no more than an unremarkable application of settled princi-

"responsible." The order, moreover, requires release only to *some* responsible party: *e.g.*, a licensed community shelter, foster care program, group home, church group, or other reputable individual. Nothing bars the INS from *preferring* one placement over another.

ples of due process to an unusual and extraordinarily compelling set of facts.

The errors in the INS's plenary authority argument are at least two. First, this is not a case involving whom to admit or exclude from the United States, an area over which the political branches are properly said to exercise plenary authority. Neither the holding nor the rationale of the court of appeals will allow a greater number of persons into this country, or otherwise effect the INS's ability to determine the circumstances under which persons are admitted, excluded, or deported. *Compare Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (substantive immigration enactments reviewed only for facial legitimacy), *with I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) (method implementing substantive immigration enactment subject to searching review), *and Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982) (same).

Second, any authority the INS properly claims is by definition subordinate to that of Congress, and *Congress*, in accord with accepted child welfare practices, is pledged to minimizing the detention of minors. 18 U.S.C. § 5034. The order below requires only that the INS be similarly circumspect. In short, it is not respondent children who quarrel with Congress's immigration power, it is the INS that seeks to thwart Congress's efforts to minimize the incarceration of children.

Once the veil of "plenary authority" is pierced, the court of appeal's opinion is unremarkable. True, the court did characterize children's interest in freedom from bodily restraint as "fundamental," but this Court did no less in *United States v. Salerno*, 481 U.S. 739, 749 (1987).

The INS counters that *Salerno* involved procedural, not substantive, due process. Respondents disagree. *See Id.* at 749-50 (balancing individual's "strong in-

terest" in bodily liberty against "needs of society"). In any event, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court expressly held that the Constitution affords *substantive* protection against physical restraint that survives even civil commitment. 457 U.S. at 315. In determining whether this right has been violated, the Court held, courts must "weigh[] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. ..." 457 U.S. at 320-321.

The court of appeals searched the record in vain for some proof that the INS's blanket approach to jailing children in fact serves a "significant" governmental purpose whatsoever. App. 19a. As has been seen, the INS failed to produce *any* evidence that automatic restrictions on children's freedom serve any governmental purpose. Indeed, the uncontroverted evidence shows the INS's policy contrary to its sole nominal purpose: protecting children. On the other side of the equation, children's fundamental interest in freedom from institutional restraint must "freely be conceded." *Salerno*, 481 U.S. at 749.

Even were the court of appeals' analysis flawed, the practical impact of its decision is so minimal that certiorari would simply not be worth granting. This is the *first and only* case in which the INS has sought to detain anyone on grounds unrelated to its statutory mission. Until now, the agency has used its detention and bail powers solely to ensure availability for deportation, to protect national security, or to further some other purpose underlying Congress's immigration policy. *See, e.g., Carlson v. Landon*, 342 U.S. 524 (1952) (national security); *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991) (protecting U.S. workers from displacement by foreign labor).

The INS counters that it is now unable to avoid "the obvious risks" releasing children to unrelated adults entails. Petition at 25. Again, the INS overstates its case.

To begin with, nothing in the district court's order prevents the INS from detaining a child it reasonably determines would be protected by detention. The order requires only in the most general terms that the agency refrain from jailing children without actual cause. How this modest protection against the needless incarceration of children is to be carried out is entirely up to the INS.

Further, the risks the INS complains it is unable to avoid are anything but obvious where, *in the more than three years since the district court's order, the agency has identified* no *child abused or neglected because of being released pursuant to that order*.

Of course, the agency is always free to seek relief from judgment if ever a single child were harmed or neglected, or if changed circumstances were otherwise to render the district court's order "detrimental to the public interest." *Rufo v. Inmates of Suffolk County Jail*, __ U.S. __, 112 S.Ct. 748 (1992) (emphasizing need for flexibility under Rule 60(b), Fed.R.Civ.Proc., to modify a decree whenever the circumstances, whether of law or fact, have changed or new ones have arisen). Clearly, the INS is anything but powerless to protect children from actual harm.

The INS's remaining complaint is that providing neutral review of children's custody status represents "a serious diversion of resources from INS's responsibilities to administer and enforce the

immigration laws." Petition at 25.[14] Without offering any evidence, the agency represents that it holds "almost three" custody hearings a day for children arrested in the Western Region. *Id.* Actually, the burden of providing children with custody hearings is far less than the petition would lead the Court to believe.

The INS began holding custody hearings for minors on June 13, 1988. Plaintiffs'/Appellees' Supplemental Brief on Rehearing En Banc, Appendix 3.[15] From that time until September 26, 1989, custody hearings were held for only 416 minors nationwide— *less than one hearing per day*. *Id.*, Appendix 1 at ¶¶ 4 and 9. Forty-five percent of these were held as part of a bond redetermination, which under its own regulations the agency has to provide regardless. *Id.* at ¶ 9. Many of the remaining custody hearings are held jointly with deportation proceedings, which the INA obliges the agency to provide regardless. Appendix 3 at 2.

As the court of appeal points out, "The only new requirements ... are that, if the alien is a child, such a hearing must be held regardless of whether the alien

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[14] So, too, is spending up to $100 per day of taxpayers' money to keep a child in INS detention facilities. 159 CR 76. Remarkably, the agency concedes having made no effort to determine whether it would be more cost-effective to screen adults seeking the release of detained children rather than continuing to detain children at public expense. 79 CR 1669-70.

[15] The referenced documents were disclosed pursuant to the Freedom of Information Act by the Executive Office of Immigration Review, an entity within the United States Department of Justice. Appendix 4. Their accuracy can be readily verified from the agency's official records, a source "whose accuracy cannot reasonably be questioned." Accordingly, they should be judicially noticed. *Cf.*, *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (Court judicially notices fishing license).

requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being." App. 25a. The INS could not possibly be burdened by providing children such minimal procedural consideration. In sum, neither the rationale nor the holding of the en banc court of appeals is of sufficient import to warrant this Court's granting the INS's petition.

II The INS's blanket approach to juvenile detention exceeds its authority under the Immigration and Nationality Act as recently construed by this Court.

As the Court's recent decision in *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991), makes clear, the Immigration and Nationality Act compels a result identical to that of the court of appeals. The Court should decline to review yet another case involving INS detention when the position the agency now advances is squarely at odds with *National Center*.

In *National Center*, the INS argued that it has authority to condition a deportable alien's release on bond on his or her refraining from unauthorized employment. The court of appeals assumed that the INS did not provide an individualized determination of whether a particular alien lacked authorization to work. Before this Court, however, the Solicitor General advised that the INS does make "'an initial, informal determination [as to] whether the alien holds some status that makes work 'authorized.'" 112 S.Ct. at 588-89. Only upon this representation did the Court approve the INS's regulation:

> We agree that the lawful exercise of the Attorney General's discretion to impose a no-

> work condition under § 212(a) requires some level of individualized determination. Indeed *in the absence of such judgments, the legitimate exercise of discretion is impossible in this context*. ...
>
> Taken together [the INS's] administrative procedures are designed to ensure that aliens detained and bonds issued under the contested regulation will receive the individualized determinations mandated by the Act in this context.

112 S.Ct. at 588-89 (emphasis supplied).

The INS's position here is expressly inconsistent with *National Center*. The INS now argues that it is entitled to *automatically* detain *all* children until and unless an immediate adult relative appears to request custody:

> In response to comments suggesting that release to responsible adults should be permitted on a regular basis, *the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests*. 53 Fed. Reg. at 17,449.

App. 7a (emphasis added); *accord* Petition at 23 n.21 ("government is entitled, as a general matter, to enact a rule of law forbidding release to unrelated adults..."; "existence of particularized harm ... irrelevant..."); and n.22 ("court of appeals erred in ... [concluding] that an individualized hearing is required in each case").[16]

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[16] Unlike *National Center*, this is not a facial challenge to a regulation enjoined on the eve of its promulgation, but, as discussed above, a challenge based on an uncontroverted record showing that INS field officers *never* release children to anyone except a parent or immediate relative.

Respondent children have consistently argued that INS detention practices exceed the agency's statutory authority because they result in *automatic* detention without any actual exercise of discretion. App. 80a. The Court need not and should not grant certiorari in yet another case involving INS detention practices when its recent decision makes clear that the agency's blanket approach to detaining children is unlawful.

III Certiorari is inappropriate where the INS has implemented policy changes not passed on by the courts below.

The INS's petition is at best unfair to the courts below: after filing its petition the agency modified its juvenile release policy, and the actual controversy before this Court appears markedly different from that presented to the district court and the court of appeals.

On December 13, 1991, the INS issued a national memorandum that purports to modify its juvenile detention and release policy. Respondent's Appendix. The memorandum directs INS field officers to release minors to "a responsible adult designated by the parent or legal guardian in a sworn affidavit" or to "a licensed child-care facility including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children." *Id.*

It is, of course, axiomatic that this Court resolves only controversies as they actually exist. Because the lower courts have yet to take evidence on how the INS's current policy is being applied or is intended to be applied, this Court's decision could amount to little more than an advisory opinion on a superseded

policy.[17] The INS is free to seek relief from judgment as the facts warrant; on this record, however, certiorari is plainly inappropriate.

CONCLUSION

For the foregoing reasons the writ should be denied. If it so desires, the INS may then present its reformed juvenile detention policy, and any evidence it may have that its current practice serves any legitimate governmental purpose, for the consideration of the district court.

Respectfully submitted.

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FEBRUARY 1992

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[17] Of course, it remains to be seen to what extent the INS's memorandum will actually ease the plight of detained children. Respondents note, for example, that the memorandum is not a formal regulation, and how INS officers will resolve conflicts between the regulations and the memorandum will require further exploration of the facts.

APPENDIX

Memorandum

Subject: National Policy Regarding Detention and Release of Unaccompanied Alien Minors — Date: DEC 13 1991

To: Regional Operations Liaison Officers District Directors Chief Patrol Agents — From: Office of the Commissioner

The purpose of this memorandum is to standardize the procedures nationwide regarding the detention, release, and treatment of unaccompanied alien minors in INS custody. This memorandum should be distributed to all INS field personnel.

The policy of the Immigration and Naturalization Service (INS) regarding the detention and release of unaccompanied alien minors is as follows:

(1) All alien minors[1] apprehended by INS or turned over to the custody of INS by state or local law enforcement agencies are to be processed for deportation or voluntary departure in accordance with 8 C.F.R. § 242.24(g) and (h).

(2) While awaiting processing, alien minors may be held by INS authorities in INS detention facilities having separate accommodations for juveniles or, if

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[1] An alien minor is defined as a male or female foreign national, under 18 years of age, who is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act (Act) or has an application for asylum pending before the INS.

such accommodations are unavailable, in suitable state or county juvenile detention facilities[2].

(3) No alien minor may be held in a detention facility, whether an INS facility or otherwise, longer than 72 hours unless the alien minor:

(a) is charged with or convicted of a criminal offense, other than entry without inspection;

(b) is adjudicated a delinquent, or is the subject of a pending delinquency proceeding;

(c) has engaged in violent or extremely disruptive conduct which requires that he or she be held in a secure facility for the safety of himself and/or others;

(d) is an escapee from another facility;

(e) is an unrepresented Salvadoran and an alternative placement is unavailable in the district where the juvenile came into INS custody (in which case the alien minor may not be transferred from the district for at least seven days);

(f) cannot be moved for other extraordinary and compelling reasons. In this case, permission from the Juvenile Coordinator or Assistant Commissioner from Detention and Deportation must be obtained before detaining the alien minor for longer than 72 hours.

(4) Except for (3) above, an alien minor shall be released from INS custody, in the following order of preference, to:

(a) a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent);

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[2] A suitable juvenile detention facility is defined as a secure facility designated for the occupancy of juveniles, Juveniles charged with delinquent acts are held in these facilities for a temporary period while awaiting adjudication of their court cases. Every effort must be taken to ensure that the safety and well-being of the alien minors detained in these facilities are satisfactorily provided for by the detention staff at the juvenile detention facilities.

(b) a responsible adult designated by the parent or legal guardian in a sworn affidavit;

(c) a licensed child-care facility[3] including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children.

(5) Before an alien minor may be released from INS custody, the person or facility assuming custody must execute an agreement to:

(a) provide for the alien minor's physical, mental, and financial well-being;

(b) ensure the alien minor's presence at all future proceedings before the INS or immigration judge;

(c) notify INS of any changes in address of the alien minor; and

(d) not transfer custody of the minor to another person or facility without prior written permission of the District Director or Chief Patrol Agent.

6) INS shall assist, without undue delay, with transportation arrangements to the INS office nearest to the location of the person or child-care facility to whom the alien minor is to be released.

7) INS may require the posting of a bond to ensure the presence of the alien minor at all future immigration proceedings.

8) If the alien minor cannot be released as set forth in paragraphs (4) and (5) above within 72 hours, INS shall place the alien minor temporarily in an INS-contracted group or foster home until such time as

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[3] A child-care facility is defined as a facility that provides care, training, education, custody, treatment, or supervision for a minor who is not related by blood, marriage, if adoption to the owner or operator of the facility, whether or not the facility is operated for profit. Licensed means approved by the appropriate state agency. An INS detention facility or a state or county juvenile detention facility is *not* a child-care facility under this definition.

release in accordance with paragraphs (4) and (5) can be affected or until the conclusion of the immigration proceedings, whichever is earlier. The unavailability of an INS-contracted child-care facility within the jurisdiction of the INS-contracted child-care facility within the jurisdiction of the INS district sector in which the alien minor is being held does not justify detention for more than 72 hours in a juvenile or adult detention facility, except in extraordinary and compelling circumstances and with the permission of the Juvenile Coordinator or Assistant Commissioner for Detention and Deportation.

9) An alien minor should be transferred from one child-care facility to another only in the most compelling circumstances. The alien minor should be transferred with all his possessions and his legal papers. No minor who is represented by counsel in an INS proceeding shall be transferred without advance notice to such counsel, nor shall any minor be denied access to legal services at the location to which he or she is transferred.

10) The 72 hour limit for detention of alien minors commences when INS assumes custody of the juvenile.

11) The Juvenile coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall maintain an up-to-date record of all alien minors in INS custody. Statistical information shall be collected weekly from all INS District Offices.

Any questions regarding this national policy should be directed to Mary Ruth Calhoun, Juvenile Coordinator, HQDDP, at FTS 368-4120 or Patricia B. Feeney, Assistant General Counsel, HQCOU, at FTS 368-2895.

Gene McNary
Commissioner